

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Licensing Order
Issued to Brian J. Barrett

ORDER ON DISCOVERY MOTION

This matter came before Administrative Law Judge Kathleen D. Sheehy on the Motion to Compel Discovery filed by the Department of Labor and Industry on August 16, 2011. The Respondent filed no written response to the motion. The motion record closed September 2, 2011, the deadline for filing a response to the motion.

Christopher M. Kaisershot, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, appeared for the Department of Labor and Industry (Department).

Karen A. Ring, Berndt Law Offices, PLLC, 101 Union Plaza, 333 Washington Avenue North, Minneapolis, MN 55401, represents Brian J. Barrett (Respondent) in this matter but did not respond to the motion or request additional time to respond.

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

1. The Department's Motion to Compel Discovery is **GRANTED IN PART AND DENIED IN PART**, as more fully explained in the attached Memorandum; and

2. The Respondent shall supplement his responses by 4:30 p.m. on September 28, 2011; and

3. A telephone prehearing conference shall take place in this matter at 1:30 p.m. on September 29, 2011, at which time a new hearing date will be scheduled.

Dated: September 14, 2011

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Department alleges that on October 25, 2010, the Commissioner issued to the Respondent a registration permitting an unlicensed individual to perform electrical work under the direct supervision of a licensed person working with the same employer.¹ On November 15, 2010, the Department issued to the Respondent an Order to Appear, which required the Respondent to appear at the offices of the Department of Labor and Industry on November 30, 2010. The Order to Appear was mailed to the Respondent at his address of record and to the address of his employer, All Main Street Electric (AMSE). The post office returned the copy sent to the Respondent's address of record, indicating that it was undeliverable. The post office also returned the copy sent to AMSE with a handwritten notation stating "Return to Sender—No Resident of this address" [sic]. The post office returned the copy sent by certified mail as being "unclaimed." The Respondent did not appear for the meeting as ordered. In addition, the Department alleges the Respondent performed electrical work requiring registration before receiving the registration.²

On January 5, 2011, the Commissioner revoked the Respondent's registration as an unlicensed individual, imposed a \$2,000 civil penalty, and ordered the Respondent to cease and desist from performing or offering to perform electrical work that requires registration or licensure in Minnesota.³ The issues for hearing are whether the Respondent failed to cooperate with the request to appear and provide information, failed to notify the Department of a change of address within 30 days, and performed electrical work without the required registration.⁴

On June 27, 2011, the Department served on the Respondent Interrogatories, Requests for the Production of Documents, and Requests for Admission.⁵ On July 29, 2011, the Respondent served written responses. The Department subsequently filed and served a motion to compel further discovery, to which the Respondent filed no written response.

The rules of the Office of Administrative Hearings specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed and authorize the filing of motions to compel. The rules further state that a party bringing a motion to compel must show the discovery is necessary, is not requested for the purpose of delay, and the issues or amounts in controversy are significant enough to warrant the discovery. The party

¹ Affidavit of Charlie Durenberger (Aug. 16, 2011) ¶ 2.

² Licensing Order With Penalty (Jan. 5, 2011).

³ *Id.*

⁴ *Id.*

⁵ Durenberger Aff. Exs. A-C.

resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.⁶

The Department's Requests for Admissions asked the Respondent to admit or deny a variety of factual allegations. With respect to all Requests for Admission that were not admitted, Interrogatory No. 1 asked the Respondent to identify all facts supporting or explaining the denial; to identify and produce all documents supporting or explaining the denial; and to identify all witnesses with knowledge of the facts supporting the denial.

Interrogatory No. 1/Request for Admission Nos. 5-10, 12-14, and 16-23.

These requests for admission ask the Respondent to admit or deny performing electrical work at specific locations on at particular times. The Respondent denied these requests for admission.⁷ In his answers to Interrogatory No. 1, he stated that he did not recall working at the addresses specified in the request and did not have any documents responsive to the request.⁸

The Department contends that this interrogatory response renders the denial ambiguous, and the Respondent should be compelled to either admit, deny, or say he lacks information sufficient to admit or deny these requests for admission. The Administrative Law Judge agrees. It is unclear from these responses whether the Respondent is saying he had nothing to do with electrical work done on these properties, or whether he is saying he just doesn't recall these specific addresses. The Department's motion to compel accurate responses to the requests for admission is granted. The Department also contends the Respondent has failed to identify documents or witnesses supporting his denials. The Administrative Law Judge again agrees. Because the denials were ambiguous, the Respondent should supplement the interrogatory answers to clarify whether there are witnesses or documents that correspond to whatever the correct response is to the requests for admission.

Interrogatory No. 2

This Interrogatory asks the Respondent to affirmatively identify every property at which he performed any electrical work on behalf of AMSE since 2006, and for each such job to identify the person who supervised his work; a description of the specific work performed; the date and number of hours worked on the property; and identification of all documents that pertain to work he performed.

⁶ Minn. R. 1400.6700, subp. 2.

⁷ Durenberger Aff. Ex. D.

⁸ Durenberger Aff. Ex. E.

The Respondent answered by stating he did not recall the specific addresses at which he performed electrical work, other than those to which he admitted.⁹ He stated that records with this information are maintained by his employer. He further stated that his electrical work was supervised by Tim Barrett and “Guyan [last name unknown];” that it included parts deliveries and service calls; and that he had no time records, invoices, or any other records with respect to the hours he worked.¹⁰

The Department contends this answer is insufficient, and the Administrative Law Judge agrees in part. The statement that his work “included parts deliveries and service calls” is not an adequate response to an interrogatory requesting that he identify the specific electrical work performed. The Department’s motion to compel a further response to Interrogatory No. 2 is granted in part; the Respondent shall describe the specific electrical work he performed. With regard to documents that support his claims, he stated that those records were maintained by his employer. Both the Respondent and the Department could potentially request subpoenas to seek documents from AMSE, but neither appear to have done so at this point. The Department’s motion to compel further identification or production of documents as required by Interrogatory No. 2 is denied.

Interrogatory No. 3

This interrogatory asks the Respondent to identify his educational background, including all education and training to perform electrical work. The Respondent answered by describing his education and stating that he had received “on the job training for electrical work.”¹¹ This answer lacks any detail that would permit the Department to identify who provided the training, when it took place, or what the training consisted of. The Department’s motion to compel further answers to Interrogatory No. 3 is granted. Moreover, during the hearing the Respondent will not be permitted to rely on evidence that is not disclosed to the Department in discovery. If the Respondent intends to offer evidence regarding his training to perform electrical work, he must supplement his answers sufficiently in advance of the hearing so that the Department can evaluate them.

Interrogatory No. 7

This interrogatory asks the Respondent to provide the full name and present address of persons with knowledge of the facts at issue in this case and to provide a brief statement of the facts known to each person. The Respondent answered “None.” These responses are not adequate. The Respondent worked for AMSE from 2006 to 2008 and from 2008 to the present, according to his

⁹ In response to Request for Admission Nos. 11 and 15, the Respondent admitted performing work in Mahtomedi and North Oaks, Minnesota.

¹⁰ Durenberger Aff. Ex. E.

¹¹ Durenberger Aff. Ex. E.

answer to Interrogatory No. 4. He should be able to identify persons with knowledge of jobs on which he has worked, what he has done on those jobs, and the manner in which he was supervised. The Department's motion to compel further response to Interrogatory No. 7 is granted

Requests for Production of Documents

Document Request No. 7 asks for documents relating in any way to electrical work performed on any property for or on behalf of AMSE since 2006, including timesheets, invoices, bills, receipts, paystubs, emails, text messages, mileage logs, calendars, notes, journals, diaries and the like. Request No. 8 asks for all documents concerning the Respondent's education and training to perform electrical work. Request No. 9 asks for cell telephone records for the time between March 1, 2008, and November 1, 2010. The Respondent stated that he had no such records pertaining to electrical work but that the response would be supplemented if documents were discovered. With regard to the request for cell phone records, the Respondent objected on the basis that the request was overly broad and not likely to produce relevant evidence.¹²

The Respondent has acknowledged being an employee of AMSE for many years. It is unclear how his paystubs might shed light on whether he performed electrical work prior to obtaining registration. Moreover, his objection to production of cell phone records is well-founded. Based on the Respondent's representations that he possesses no further documentation, the Administrative Law Judge will deny the Department's motion to compel at this time. It appears that subpoena requests directed to the employer would be a more efficient way of determining on which jobs the Respondent has performed electrical work and when that work took place.

K. D. S.

¹² Durenberger Aff. Ex. F.